Tai Wah Construction Co v Government of Malaysia (Jabatan Kerja Raya Sarawak)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q–01–107 OF 1999
MOHD GHAZALI, NIK HASHIM JJCA AND LOW HOP BING J
22 JUNE 2004

Arbitration — Award — Setting aside — Discretion of court to intervene — Whether sufficient circumstances exist to justify interference — Whether allegation of error of law on face of award proven

The respondent and the appellant entered into a contract ('the said contract') whereby the latter was appointed by the former to construct and complete the building of a school. Subsequently a dispute arose between the parties arising from the slow progress of the appellant in carrying out the works at hand. It finally culminated with the respondent terminating the said contract *vide* letter dated 5 November 1990. The respondent also alleged that as a result of the appellant's failure to proceed diligently with the works, the appellant had by its own accord repudiated the said contract. In view of the dispute and pursuant to cl 43 of the Sarawak Public Works Department's 'General Conditions of Contract' ('the GCC') which formed part of the said contract, the parties agreed to refer the matter for arbitration. Both parties agreed to refer two issues for the determination of the arbitrator: (i) whether the determination of the said contract was lawful under the GCC or at common law in the circumstances of the facts of the case; and (ii) whether the losses and damages claimed in the circumstances of the case are claimable in law and in fact. The arbitrator concluded that: (a) that the determination of the said contract was not lawful and directed the respondent to pay the appellant total sum of RM64,998.26 as full satisfaction of the appellant's claim. The arbitrator also did not allow other claims of the appellant like indemnity for performance bond and similarly found that the respondent was not entitled to the sums claimed in its counter claim. The appellant filed for an order before the High Court to have the arbitrator's award be remitted or set aside on the ground that the award 'on the face thereof is bad in law'. No formal application was made by the respondent but they too wanted the award to be remitted to the arbitrator for reconsideration. The trial judge dismissed the application and hence, this appeal.

Held, dismissing the appeal with costs:

(1) Section 23 of the Arbitration Act 1952 confers a wide discretion for the court to remit an award. However, this discretion would not be exercised merely on the premise that parties have formed the view that the award is bad on the face of it (see para 14).

(2) The parties had agreed to refer the dispute between their goodselves to arbitration and had chosen the arbitrator. The arbitrator made a decision and furnished the grounds of his award. The appellant alleged that the award was bad on the face of it but failed to show the court, what moved the arbitrator to reach that decision. As such, the arbitrator's decision was binding upon the parties both in matters of law and fact unless it is proven, *inter alia*, that there has been some mistake of law apparent on the face of the award. As such there was nothing erroneous about the trial judge's use of discretion in deciding not to remit the award to the arbitrator for reconsideration of (see paras 27 and 31).

[**Bahasa Malaysia summary**

Responden dan perayu menandatangani satu kontrak ('kontrak tersebut') di mana perayu dilantik oleh responden untuk membina dan menyempurnakan sebuah sekolah. Pertikaian berlaku di antara pihak-pihak kerana kelambatan dalam melakukan kerja oleh perayu. Ia mengakibatkan kontrak tersebut ditamatkan oleh responden melalui surat bertarikh 5 November 1990. Responden juga menyatakan kerana kegagalan perayu untuk meneruskan kerja dengan tekun, perayu dengan sendirinya telah menyangkal kontrak tersebut. Atas pertikaian tersebut dan mengikut kl 43 Syarat-syarat Kontrak Am Jabatan Kerja Raya Sarawak ('GCC') yang merupakan sebahagian daripada kontrak tersebut, pihak-pihak bersetuju untuk merujuk pertikaian tersebut kepada timbang tara. Kedua-dua pihak setuju untuk merujuk dua isu kepada timbang tara: (i) sama ada penamatan kontak tersebut adalah sah di bawah GCC atau common law mengikut fakta kes ini; dan (ii) sama ada kehilangan dan kerugian yang dituntut mengikut kes ini boleh dituntut di bawah undang-undang dan fakta. Penimbang tara telah memutuskan bahawa: (a) penamatan kontrak tersebut adalah tidak mengikut undang-undang dan memerintahkan responden untuk membayar perayu RM64,998.26 sebagai penyelesaian penuh tuntutan perayu. Penimbang tara tersebut juga tidak membenarkan tuntutan perayu yang lain seperti jaminan terhadap kerugian untuk bon pelaksanaan dan juga memutuskan responden tidak layak untuk jumlah yang dituntut di dalam tuntutan balas. Perayu memfailkan untuk satu perintah di hadapan Mahkamah Tinggi bagi award timbang tara tersebut dihantar semula kepadanya atau diketepikan atas alasan award tersebut salah mengikut undang-undang. Tiada permohonan rasmi dibuat oleh responden tetapi mereka juga inginkan award tersebut dikembalikan kepada timbang tara untuk dipertimbangkan. Hakim bicara telah menolak permohonan tersebut, maka rayuan ini dibuat.

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 23 Akta Timbang Tara 1952 memberikan budi bicara yang luas untuk mahkamah mengembalikan sesuatu award. Akan tetapi, budi bicara ini tidak akan dilaksanakan hanya atas alasan bahawa pihak-pihak telah berpendapat bahawa award ini khilaf pada mukanya (lihat perenggan 14).

(2) Pihak-pihak telah bersetuju untuk merujukkan pertikaian di antara mereka untuk timbang tara dan telah memilih penimbang tara tersebut. Beliau telah membuat keputusan berkenaan dan memberikan alasan-alasan untuk awardnya. Perayu telah mengadu bahawa award tersebut khilaf pada mukanya tetapi gagal untuk menunjukkan kepada mahkamah apa yang mendorong penimbang tara untuk mencapai keputusan tersebut. Maka dengan itu, keputusan penimbang tara mengikat pihak-pihak tersebut, dalam undang-undang atau fakta melainkan ia dibuktikan, antara lain, bahawa terdapat kekhilafan undang-undang yang terlihat pada muka award tersebut. Oleh itu, tidak apa-apa yang salah mengenai penggunaan budi bicara hakim bicara dalam memutuskan untuk tidak meremitkan award tersebut kepada penimbang tara untuk dipertimbangkan semula (lihat perenggan 27 dan 31).]

Notes

For case on application to set aside award, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1159.
For application to set aside award, see 13 *Halsbury's Laws of Malaysia*, para [220.124].
For grounds for setting aside awards, see 13 *Halsbury's Laws of Malaysia*, para [220.125].

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (Formerly known as Maltran Air Services Sdn Bhd) and Another Appeal [1996] 2 MLJ 517 (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481 (refd)
Ong Guan Teck & Ors v Hijjas [1982] 1 MLJ 105 (refd)
Teknik Cekap Sdn Bhd v Public Bank Bhd [1995] 3 MLJ 449 (refd)

Legislation referred to

Arbitration Act 1952 s 23
Rules of the High Court 1980 O 69 r 4

Anthony Ngeh (Cheng & Associates) for the appellant.
Mahiran Isa (Federal Counsel) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

[1] The appellant, Tai Wah Construction Co is a registered business enterprise, as opposed to a company incorporated under the Companies Act 1965, and is solely owned by one Leng Koo Ching @ Tom Anak Dupo. As the appellant is not a legal entity by itself, we are of the view that it would have been more proper if the application was brought in the name of the said Leng

Koo Ching @ Tom Anak Dupo trading as Tai Wah Construction Co. The respondent is the Government of Malaysia.

[2] The facts showed that on 29 May 1989 the respondent (as 'employer') and the appellant (as 'contractor') entered into a contract ('the said contract') whereby the latter was appointed by the former to construct and complete the building of a school, namely, Sekolah Menengah Kerajaan Kabong, Kalaka, Sri Aman Division, Sarawak for a contract sum of RM6,486,706.98. The time for completion of the said contract was stated therein as 16 months.

[3] Subsequently a dispute arose between the parties arising from the slow progress of the appellant in carrying out the works at hand. It finally culminated with the respondent terminating the said contract *vide* letter dated 5 November 1990. In addition thereto, the respondent also alleged that as a result of the appellant's failure to proceed diligently with the works, the appellant had by its own accord repudiated the said contract.

[4] In view of the dispute and pursuant to cl 43 of the Sarawak Public Works Department's 'General Conditions of Contract' (hereafter referred to as 'the GCC') which formed part of the said contract, the parties agreed to refer the matter for arbitration. Clause 43 of the GCC provides, *inter alia*, that in case any dispute or difference shall arise between the parties, 'then either party shall forthwith give to the other notice in writing of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed upon between the parties in accordance with and subject to the provisions of the Arbitration Ordinance, and the award of such arbitrator shall be final and binding on the parties'.

[5] Both parties agreed to refer two issues for the determination of the arbitrator, one Richard Chua Geok Seng, namely —

(i) whether the determination of the said contract was lawful under the GCC or at common law in the circumstances of the facts of the case; and

(ii) whether the losses and damages claimed in the circumstances of the case are claimable in law and in fact.

[6] At the end of the day, the arbitrator made the following findings —

(a) that the determination of the said contract was not lawful under the circumstances of the GCC or at common law in the circumstances of the facts of the case;

(b) that the appellant was entitled to recover from the respondent the following —

(i) a sum of RM32,709.17 for work done including road works up to the date of determination;

(ii) a sum of RM26,378 for materials on site at the time of determination;

(iii) a sum of RM5,911.09 for price variation;

(c) that the appellant was *not* entitled to the following —

(i) a sum of RM324,335.34 as indemnity on the performance bond and the interest thereon;

(ii) a sum of RM150,000 for costs;

(iii) a sum of RM768,000 for loss of profit;

(iv) a sum of RM1,142,250 for finance costs;

(v) a sum of RM1,200,000 for damages;

(vi) a sum of RM33,825.89 for price variation.

[7] The arbitrator also found that the respondent was *not* entitled to the sums claimed in its counter-claim. The last part of his award reads as follows

> 11 I direct the respondent to pay the claimant the total sum of RM64,998.26 and I award that the said sum of RM64,998.26 shall be paid, accepted and taken as and for full satisfaction and discharge and a final end and determination of the said matters in difference so referred to me as aforesaid and of all demands upon or in respect of the same by any or either of the said parties against the other of them.
>
> 12 I also award that the claimant is entitled to interest of the said sum of RM64,998.26 at the rate of eight per cent per annum (8% pa) from the date of this award to the date of payment and I direct the respondent to pay such interest accordingly to the claimant.
>
> 13 I award and direct that the costs of and incidental to this reference and costs of the award shall be borne and paid by the parties as to one-quarter by the claimant and as to three-quarters by the respondent.

[8] The award was dated 28 July 1998. On 8 September 1998 the appellant filed a notice of originating motion in the High Court, Kuching pursuant to O 69 r 4 of the Rules of the High Court 1980 moving for an order that the award be remitted or set aside on the ground that the award 'on the face thereof is bad in law' and that the costs of and incidental to the application be paid by the respondent. In his affidavit in support of the application, the said Leng Koo Ching @ Tom Anak Dupo stated, *inter alia,* that he was advised by counsel and 'verily believe that there are serious errors of fact and/or law on the face of the award and the grounds of award, which would warrant the award to be remitted or set aside'. The judge dismissed the application and hence, this appeal. The application was made pursuant to s 23 of the Arbitration Act 1952 ('the Act') which reads —

(1) In all cases of reference to arbitration, the High Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.

(2) Where an award is remitted, the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order.

[9] In his grounds of decision, the judge said it is trite law that the power of the High Court to remit an award to the reconsideration of the arbitrator is a discretionary one. He referred to *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105. In that case Hashim Yeop A Sani J (as he then was) said (at pp 106–107):

> As referred to earlier in the judgment section 23 of the Arbitration Act 1952 seems to confer a wide discretion for the court to remit an award.
>
> It has long been accepted that the decision of an arbitrator, whether a lawyer or a layman, is binding on the parties both in matters of law and in matters of fact unless it is proved that there has been fraud or corruption on his part or there be some mistake of law apparent on the face of the award — see *Hodgkinson v Fernie & Anor* 140 ER 712. It has also been held as settled law as early as 1898 in *Montgomery Jones & Co v Liebenthal & Co Ltd* (1898) 78 LT 406; Digest 456, 1036 that the following grounds would constitute good grounds for the court to remit an award, namely:
>
> (1) that the award is bad on the face of it;
>
> (2) that there has been misconduct on the part of the arbitrator;
>
> (3) that there has been an admitted mistake and the arbitrator asks that the matter be remitted; and
>
> (4) where additional evidence has been discovered after the making of the award.
>
> However, as Diplock said in *Margulies Brothers Ltd v Dafnis Thomaides & Co (UK) Ltd* [1958] 1 WLR 398; [1958] 1 All ER 777 the court is by no means limited to the 4 grounds referred to although, "I should naturally hesitate before exercising my discretion to remit a case which does not come within any one of the four categories there approved".

[10] The judge found that the allegations of errors of fact and or law on the face of the award complained of were only concerned with the quantum of damages awarded or not awarded by the arbitrator. He also found that the appellant failed to adduce substantive evidence to support the allegations made. He further noted that in the arbitrator's grounds of award, it was the expressed conclusion of the arbitrator that the appellant failed to satisfy on a balance of probabilities the amounts claimed as shown in the appellant's 'points of claim'. He was of the view that the appellant should have taken comfort in the fact that despite the above-said conclusion drawn by the arbitrator, the arbitrator proceeded to award damages to it.

[11] At the end of the day, the judge found there was no evidence to suggest that the arbitrator had misdirected himself in awarding the damages and the quantum as stated in his award. He was of the view that unless it is apparent that the award was bad on the face of it, it is not justifiable for the court to interfere with the conclusion of the arbitrator. He concluded that the appellant's allegations of serious errors of fact and/or law on the face of the award were plainly unsustainable.

[12] In his grounds of decision, the judge pointed out that apart from the appellant's application, the respondent also sought leave of the court, without making a formal application, to remit the award to the reconsideration of the arbitrator. On this point, the learned judge said:

> However it must be emphasized that neither is there an application taken out by the defendant under s 23 of the Arbitration Act nor one under O 69 of the Rules of the High Court 1980 which provides a time limit of 6 weeks after the award has been made and published, for an application to be made to the court. The intention of the defendant to remit the award could only be inferred from the contents of the affidavit in reply and joint issue of Tan Kim Ann affirmed on 7 April 1999. Had there been no application taken out by the plaintiff herein, the defendant would have been perfectly contented to accept the award as final and conclusive as shown in the affidavit in support of extension of time affirmed by Tan Kim Ann on 7 April 1999 at para 4 therein as follows:-
>
> > 4 Upon receipt of the award, the defendant did not proceed to apply for the award to be set aside or to remit the award under section 23 or 24 of the Arbitration Act. The defendant was under the impression that the parties are to treat the award as final and conclusive unless either party informed the other of its disagreement of the award.
>
> 13 Apart from the abovesaid impression held by the defendant, it is also apparent that the defendant had paid the plaintiff pursuant to the said award. In the circumstances, this court is not amenable to remit the award as urged by the defendant because the intention evinced by the defendant all along had been to accept the award as final and conclusive before the plaintiff took out the present application. To decide otherwise would tantamount to ignoring the provision of O 69 of the Rules of the High Court with impunity.

[13] Before us, the appellant's counsel contended that since both parties had urged the court to remit the award to the reconsideration of the arbitrator, the learned judge should have accordingly made an order to that effect. The learned judge erred in law when he applied the principle adopted in *Ong Guan Teck & Ors v Hijjas*, *supra*, *viz*, that the power of the court is a discretionary one. Counsel pointed out in *Ong Guan Teck* the application was contested whereas in the instant case both parties consented that the matter be remitted to the reconsideration of the arbitrator.

[14] Section 23 of the Act confers a wide discretion for the court to remit an award. We however do not think that just because parties have formed the view that the award is bad on the face of it, the court need not go further and should grant an order in terms of any motion to remit the award to the reconsideration of the arbitrator. That seems to be the stand of the appellant in the court below and the appeal before us. In order to determine whether an award is bad on the face of it, which would warrant the award to be remitted to the reconsideration of the arbitrator, a judge will have to scrutinise the grounds of award and all accompanying affidavits and its contents presented with the motion before he can determine whether he should exercise his discretion pursuant to s 23 of the Act.

[15] The only ground canvassed by the appellant before the learned judge was that the award was bad on the face of it. Before us, the appellant's counsel argued that the arbitrator's grounds of award failed to sufficiently set out the detailed facts and/or reasons that led to the award. He complained that the award is plainly incapable of being enforced as it was not cogent, incomplete and uncertain. He also complained that "it is apparent on the face of the award that the award as given by the arbitrator was bad because the award was not convincing, persuasive and of consistent reasoning". We cannot fathom this. From our reading, the award and the grounds of award were clear, capable of being enforced and in fact enforced. The facts showed that the respondent had paid the appellant the damages as awarded by the arbitrator.

[16] The respondent's letter of acceptance of the appellant's tender for the construction of the school building, dated 27 April 1989 stated the time for completion of the works was 16 months. The contract was executed on 29 May 1989. The appellant was also reminded in the respondent's said letter of acceptance that in accordance with the conditions of the contract to be signed, the appellant was responsible for applying for an extension of time for completion of the works within seven days on the occurrence of any event listed in cl 29 of the contract. One of the 'events' listed in cl 29 was with regards to the inability of a contractor for reasons beyond his control to secure such labour and materials as may be essential to the proper carrying out of the works. By letter dated 5 May 1989, the respondent advised the appellant to commence works on 8 June 1989 which was also the date of possession of the site and that the date of completion of the works would be 7 October 1990. By letter dated 8 January 1990, the respondent reminded the appellant that the official completion date would be on or before 7 October 1990. By a further letter dated 22 March 1990, the respondent wrote to the appellant as follows —

> I wish to refer to my recent site visit on 19 March 1990 together with my architect, En Lee Hok Kong. It was noted with great disappointment that the site was completely abandoned without any worker on site.
>
> The project has been progressing at snail's pace and about 50% behind schedule. Further more this office has been queried by the client department on the slow progress and also that the school operation will commence in December 1990.
>
> As such, this office will appreciate if you could explain your delay and why JKR could not take action against you.
>
> Your prompt reply is sought, please.

[17] Consequently by letter dated 5 November 1990, the respondent wrote to the appellant as follows —

Tuan,

Termination

Construction and Completion of Sekolah Menengah Kerajaan Kabong, Kalaka, Sri Aman Division

Further to my letter of the same series dated 2.10.90, you have failed to remedy the defaults stated therein.

2 In accordance with Clause 30 of the General Conditions of Contract and without prejudice to any other rights and remedies, your employment under the above Contract is hereby determined/terminated.

[18] In his grounds of award, dated 28 July 1998, the arbitrator said:

It is significant to note that by notice dated the second day of October, 1990 the claimant was given 14 days to start and continue work.

From the evidence adduced, it is clear that the claimant did not at any time stop work and in fact work was carried out by the claimant under the supervision of the respondent's site supervisors up to the tenth day of November, 1990 when the site supervisors left the site.

I therefore find that the notice dated the second day of October, 1990 was defective.

Quite apart from the said defect, I am of the opinion that the respondent had not complied with the prescribed procedure for terminating the contract when the respondent served the notice of termination dated the fifth day of November, 1990 when it should have been served within ten (10) days after the expiry of the fourteen (14) days stated in the notice dated the second day of October, 1990.

Furthermore from the evidence adduced, I find that although there may be breach by the claimant in not carrying out the works in a reasonably diligent manner, the breach does not amount to repudiation as the respondent has failed to establish that the acts of the claimant evinced an intention no longer to be bound by the contract. Besides the contract provides for liquidated ascertained damages to be paid by the claimant for any delay of the works.

I further find that even if there was repudiation, the respondent did not within a reasonable time or at all accept such repudiation but on the contrary elected to treat the contract as still binding and operative and is accordingly not entitled to rely upon the alleged repudiation.

Accordingly I find that the determination of the contract was not lawful under the conditions of the contract or at common law in the circumstances of the facts of this case.

[19] Having found that the termination of the said contract was not proper under the circumstances, the arbitrator went on to consider the appellant's claim and as discussed earlier, he awarded part of the damages claimed by the

appellant. The respondent's claim for the following was *not* allowed by the arbitrator, namely —

(i) difference on costs due to awarding the new contract to another contractor to carry out and complete the works — RM188,286.62;

(ii) additional expenses incurred by the respondent to recall consultant and recall tender and supervise work — RM1,131,144.87;

(iii) additional expenses incurred by the respondent to recall tender on electrical contract — RM109,880; and

(iv) general damages for the lost of use of SMK Sekolah Sri Aman from the period of termination of this contract till the date of completion by the new contractor — to be assessed.

[20] Upon perusing the appellant's skeletal submission, we noticed that the major brunt of its attack on the award was with regards to the finding of the arbitrator in relation to a performance bond. It would be appropriate to mention here that the respondent's letter of acceptance of the appellant's tender for the works imposed a requirement as to security which could be in the form of a cash deposit of RM324,335.34 or in the form of a performance bond; the appellant chose to provide the latter. In relation to this, the appellant contended that the ground upon which the matter should be remitted to the reconsideration of the arbitrator was his finding that it was not entitled to the said sum of RM324,335.34 as indemnity under the performance bond and the interest thereon. The appellant complained the arbitrator did not mention as to whom the said sum RM324,335.34 should belong and to whom it should be paid. With regards to this, the appellant highlighted the following findings of the arbitrator —

(a) that 'the determination of the contract was not lawful under the conditions of the contract or at common law in the circumstances of the facts of this appeal';

(b) that the appellant was not entitled to the said sum of RM324,335.34 as indemnity on the performance bond and the interest thereon.

[21] The appellant's counsel pointed out the reasons given by the arbitrator were as follows —

(i) the appellant has not proved that it had sustained a loss in the sum of RM324,335.34 arising out of the performance bond;

(ii) the proceeds of the performance bond has been paid by the insurers, namely, Nanyang Insurance Co to the respondent after the termination of the said contract;

(iii) there is no evidence at all to show that the appellant has paid the said sum of RM324,335.34 to Nanyang Insurance Co; and

(iv) while it is true that Nanyang Insurance Co had commenced foreclosure proceedings against 'Tom Leng' (whom we presume would be the said Leng Koo Ching @ Tom Anak Dupo) and his wife, the registered proprietors of Lot 1076 Undup Land District which was charged to Nanyang Insurance Co as security for a sum of RM75,000, there is no evidence at all to show that the appellant had paid the said sum of RM324,335.34 to Nanyang Insurance Co; further, the foreclosure proceedings were against both Tom Leng and wife and the sum claimed was only RM75,000.

[22] Counsel explained the performance bond was 'taken out' by the appellant with Nanyang Insurance Co at the request of the respondent; in the event of the appellant's default in carrying out its contractual obligation, the respondent will have recourse to the issuer of the bond for payment of the said sum of RM324,335.34. He argued that the arbitrator was wrong in principle when —

(a) he omitted to refer to and to construe a letter of indemnity dated 1 August 1989 entered into between the appellant and Nanyang Insurance Co;

(b) he did not look into the surrounding circumstances to see what was the subject matter which the parties had in their contemplation when the letter of indemnity was given.

[23] Counsel also contended that the respondent was not entitled to call on the performance bond since they were in breach of the said contract. Since the arbitrator has decided that the respondent was in breach when it terminated the said contract, the arbitrator could not proceed to allow the respondent to keep the proceeds under the performance bond. The arbitrator should have directed the respondent to refund the proceeds to the appellant since it was the default party to the agreement.

[24] From the appellant's extensive submission as discussed above, it can be seen that its unhappiness with the award was especially towards the proceeds of the performance bond. What is a performance bond? In his book entitled *Law of Banking* (2nd ed), at p 824, Poh Chu Chai was of the view that it is 'essentially a guarantee given by a bank, on behalf of customers to a third party, that the customer would duly carry out his contract with the third party'. In *Teknik Cekap Sdn Bhd v Public Bank Bhd* [1995] 3 MLJ 449 at p 454, Shaik Daud JCA had this to say:

> Having considered the submissions it is relevant to find out what therefore is a performance bond. As I see it there is nothing special or unique in a performance bond. It is in fact a written contract of guarantee by a bank, other financial institutions or in some cases an insurance company, whereby they guarantee the due performance of a contract and in the event of a breach or non-performance of the contract, they guarantee to pay, on a written demand being made, the sum stipulated in the guarantee. Therefore a performance bond is nothing more than a

written guarantee, and in order to interpret the obligations of the bank, one need only to look at the written bond itself to determine what are the terms and conditions agreed upon between the parties. A great deal, therefore, depends on the wording of the bond itself.

[25] In *China Airlines Ltd v Maltran Air Corp Sdn Bhd* [1996] 2 MLJ 517 Mohamed Dzaiddin FCJ (as he then was) said (at p 535):

> A bank guarantee is a performance bond. There are two types of performance bond. The first type is a conditional bond whereby the guarantor becomes liable upon proof of a breach of the terms of the principal contract by the principal and the beneficiary sustaining loss as a result of such breach. The guarantor's liability will therefore arise as a result of the principal's default. The second type is an unconditional or 'on demand' performance bond which is so drafted that the guarantor will become liable merely when demand is made upon him by the beneficiary with no necessity for the beneficiary to prove any default by the principal in performance of the principal contract.

[26] In his book, referred to above, Poh Chu Chai said (at p 827):

> A bank giving a performance guarantee is in no way concerned with the underlying contract on which the performance guarantee may be based. A bank is in no way affected by any dispute between its customer and the beneficiary of the performance guarantee over their underlying contract. In *RD Harbottle v National Westminster Bank* [1977] 2 All ER 862, it was decided, *inter alia*, by Kerr J that a dispute between a customer and the beneficiary of a performance guarantee over their contractual rights should not be allowed to interfere with a bank's payment obligations under the performance guarantee.

[27] We have not sighted the performance bond referred to in the instant case and hence were not in a position to see the terms and conditions set out therein. Was it a conditional bond or an unconditional or 'on demand' bond? It would seem that the said performance bond was an unconditional or 'on demand' on the basis that the facts denote that the respondent made a call on the bond and had received the proceeds. The arbitrator found that the appellant had not proved that it was entitled to the proceeds of the bond. Nanyang Insurance Co issued the bond in favour of the respondent on the instructions of the appellant. The respondent had made a call on the bond and Nanyang Insurance Co, which is not in any way concerned with any dispute between the parties, was obliged to release the proceeds to the respondent as beneficiary. The facts showed there was delay on the part of the appellant in its endeavour to complete the works. It is for the appellant to show to the court, on the face of the award, what moved the arbitrator to reach the decision that it was not entitled to the proceeds of the bond. This would be the determining consideration with regard to the use of discretion by the court. Having failed to show that to the court, we cannot find anything erroneous with the learned judge's use of discretion not to remit the award to the reconsideration of the arbitrator.

[28] In opposing the appeal, the respondents' counsel contended the appellant failed to prove that the award was bad on the face of it. He submitted that all the appellant is complaining of is not errors of law on the face of the award but rather asking the court to remit the award to the reconsideration of the arbitrator because the arbitrator did not award damages on several items appearing in its 'points of claim' on the ground that it had not been proved. We would agree with him. The appellant has failed to clearly show that the award was bad on the face of it. The appellant's contention that the arbitrator's finding was erroneous cannot stand at all. The appellant has to show that the award was ambiguous or uncertain and that it had failed to do so.

[29] The decision of the learned judge in refusing to remit the award to the reconsideration of the arbitrator was an exercise of discretion. We are of the view that there was nothing erroneous with his decision. Two issues were posed before the arbitrator, as discussed earlier. On the first issue, the arbitrator had decided that the determination of the agreement was not lawful. He was of the view that the respondent had not complied with the prescribed procedure for terminating the contract as provided for in cl 30(a) of the GCC. It was a procedural defect relating to time-frame on service of notices and nothing more. On the second issue, he had decided that the appellant was only entitled to part of the claim appearing in its 'points of claim'. He also found that the respondent was not entitled to the sums claimed under its counterclaim. We have perused the material available before us and found nothing to support the contention of the appellant that the award was bad on the face of it. Neither have we found anything to denote that there has been misconduct on the part of the arbitrator which would entitle the matter to be remitted for reconsideration or that there has been an admitted mistake and the arbitrator has asked that the matter be remitted for reconsideration. In *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481, Gopal Sri Ram JCA, after having reviewed various authorities concerning the role of the court in remitting or setting aside an award by the arbitrator, said (at p 489):

> In my judgment, the jurisdiction to set aside or to remit an arbitrator's award whether at common law or under statute is one that should be exercised with great care and with a proper sense of responsibility. One may do well to keep in mind the words of Sharma J in *Puri Construction Pvt Ltd v Union of India* AIR 1989 SC 777 at p 780:
>
> > When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits.

[30] The learned judge in the instant case was of the view that the allegations of errors of fact and or law on the face of the award essentially concerned the quantum of damages awarded or not awarded by the arbitrator. He held that the appellant failed to show any substantive evidence to support its allegations.

A He noted that it was the expressed conclusion of the arbitrator that the appellant failed to satisfy on a balance of probabilities the amounts claimed in its 'points of claim' and that the damages awarded to the appellant was made on the basis of the respondent's own admission in the course of the arbitration. We would agree with the learned judge that there is no evidence B to suggest that the arbitrator has misdirected himself in awarding the damages and the quantum as stated in his award. We would also agree with him that unless it is apparent on the face of the award that the said award is bad, it is not justifiable for the court to interfere with the conclusion of the arbitrator.

[31] The parties have contracted to refer the dispute between their goodselves C to arbitration and have chosen the arbitrator. The arbitrator has made a decision and have furnished the grounds of his award. The appellant alleged that the award was bad on the face of it. That being his ground, he has to show the court, on the face of the award, what moved the arbitrator to reach that decision. Allegations of errors of law and/or facts have to be proved. D The decision of an arbitrator is binding on the parties both in matters of law and in matters of fact unless it is proved, *inter alia*, that there has been some mistake of law apparent on the face of the award. Since there is nothing to show that the award was bad on the face of it, we find no reason to differ from the learned judge's decision and accordingly dismissed this appeal with E costs and ordered that the deposit be remitted to the respondent towards the account of taxed costs.

Appeal dismissed.

Reported by AG Kalidas

F

G

H

I